Office-Supreme Court, U.S.
FILED
JUL 1 1981
ALEXANDER L. STEVAS,
CLERK

81-6

No. ....

IN THE

Supreme Court of the United States

October Term, 1980

FORD MOTOR COMPANY,

Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GEORGE RICHARD DOTY,
JONATHAN MARK GORDON,
3435 Wilshire Blvd., 30th Floor,
Los Angeles, Calif. 90010,
(213) 381-3411,
and
GEORGE W. BULLEN,
JOSEPH J. DEHOPE, JR.,
555 Capitol Mall, Suite 1590,
Sacramento, Calif. 95814,
(916) 444-3495,
Counsel for Petitioner
Ford Motor Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented for Review.

The following questions are presented for review by this petition:

1. Whether the Court of Appeals for the Ninth Circuit erred and exceeded its authority on appellate review when it ignored the fact as found by the trial court (fully supported by substantial evidence) that, in a prior action for personal injuries in a California state court, plaintiff had given a dismissal with prejudice to Ford Motor Company in exchange for a waiver of costs because plaintiff believed that Ford Motor Company's proportion of fault for the injuries to plaintiff was zero, and instead grounded its decision on the contrary factual proposition that the dismissal did not reflect a consideration of the relative liabilities of the parties to the plaintiff, with the result that the judgment of the District Court was reversed, rather than affirmed.

2. Whether the Court of Appeals for the Ninth Circuit erred in construing the provision of California Code of Civil Procedure §877 which provides for the release of a tortfeasor from liability for any contribution to other tortfeasors to be applicable only in the case of "settlements" which reflect a good faith determination of the relative liabilities of the various parties to the litigation.

Parties.

The caption to the case contains the names of all parties to the proceeding in the Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed.

In response to U.S. Sup. Ct. Rule 28.1, Ford Motor Company states that it has no parent company. Its less than wholly owned subsidiaries and affiliates are listed in the Appendix (p. 32).

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties	i
Jurisdiction of This Court	2
Statutory Provision	2
Statement of the Case	3
Matters Respecting State Court — Inapplicable	8
Jurisdiction of Federal Courts	8
Argument	9
Reasons for the Allowance of the Writ	9
Question 1 — Basing the Decision on Facts Different From and Opposite to the Facts Found by the Trial Court	9
Question 2 — Error in Construing California Code of Civil Procedure §877	14
Conclusion	15
Appendix. Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1
Order Amending Opinion	9
Order	10
Order Dismissing Action	12
Judgment	17
Order Modifying Order of December 13, 1978	18
Trial Testimony of James F. Boccardo, October 30, 1978	19
List of Subsidiaries (Other Than Wholly Owned Subsidiaries) and Affiliates of Ford Motor Company (U.S. Sup.Ct. Rule 28.1)	32

TABLE OF AUTHORITIES

Cases	Page
Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980)	14
Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977)	10
Dompeling v. Superior Court, 117 Cal.App.3d 798, 173 Cal.Rptr. 38 (1981)	14
Fisher v. Superior Court, 103 Cal.App.3d 434, 163 Cal.Rptr. 47 (1980)	14
Labor Board v. Pittsburgh S.S. Co., 337 U.S. 656 (1948)	9
Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1975)	10
United States v. General Dynamics Corp., 415 U.S. 486 (1973)	10
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	10

Rules	
Federal Rules of Civil Procedure, Rule 52(a)	9, 10, 14
Rules of the United States Supreme Court, Rule 17(a)	9, 15
Rules of the United States Supreme Court, Rule 19(b)	15
Rules of the United States Supreme Court, Rule 20.4	2
Rules of the United States Supreme Court, Rule 28.1	i

Page

Statutes

California Code of Civil Procedure, Sec. 877 ..... i, 2, 4, 5, 13, 14
California Code of Civil Procedure, Sec. 877(b) 2
United States Code, Title 28, Sec. 1254(1) 2
United States Code, Title 28, Sec. 1291 6
United States Code, Title 28, Sec. 1332(a)(1) 4
United States Code, Title 28, Sec. 1332(c) 4
United States Code, Title 28, Sec. 2101(c) 2

No. . . . .

IN THE

Supreme Court of the United States

October Term, 1980

FORD MOTOR COMPANY,

Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner FORD MOTOR COMPANY prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 17, 1981, as modified by orders of April 9, 1981 and April 24, 1981.

The original opinion of the Court of Appeals for the Ninth Circuit (without the modifications made by the orders of April 9, 1981 and April 24, 1981) is reported at 640 F.2d 210. The modifying orders of April 9, 1981 and April 24, 1981 are not yet reported. The Order Dismissing Action of the United States District Court, Northern District of California (Hon. Alfonso J. Zirpoli, Judge) dated December 13, 1978, and the Order of that court dated January 4, 1979, modifying the Order of December 13, 1978 were not reported. All of the foregoing opinions and orders are reproduced in the Appendix.

Jurisdiction of This Court.

The opinion and judgment of the Court of Appeals for the Ninth Circuit was entered on February 17, 1981. An order modifying that opinion was entered on April 9, 1981. An order denying a timely petition for rehearing and suggestion for rehearing *en banc* was entered on April 24, 1981 and this petition was timely filed within ninety days of that date. 28 U.S.C. §2101(c); U.S. Sup.Ct. Rule 20.4. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provision.

The statutory provision which is involved in this case is Section 877 of the California Code of Civil Procedure, which reads in its entirety as follows:

> Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort —
>
> (a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and
>
> (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

This case is particularly concerned with the construction to be given to the preamble and subdivision (b) of said Section 877.

Statement of the Case.

In 1970, an action was filed in the Superior Court of the State of California for the County of Santa Clara by John Meyers against Ford Motor Company, Haberfelde Ford Company (and numerous fictitiously named defendants, none of whom was ever served with process or otherwise made a party to the case) to recover damages for grievous personal injuries sustained by Mr. Meyers allegedly because of the opening of an ostensibly locked door of an automobile manufactured by Ford Motor Company and repaired by Haberfelde Ford Company. (C.T. 12) On the eve of trial, Friday, January 11, 1974, Meyers dismissed his complaint against Ford Motor Company with prejudice in consideration of the waiver of costs by Ford Motor Company. (R.T. 24) Thereafter and prior to commencement of trial, plaintiff Meyers offered to settle with Haberfelde Ford Company for $150,000, which offer was refused. (C.T. 359) The case proceeded to trial, on Monday, January 14, 1974, against Haberfelde Ford Company alone. The jury returned a verdict in favor of plaintiff and against Haberfelde Ford Company in the sum of $3,250,000, and judgment was entered on the verdict. Haberfelde Ford Company appealed from the judgment. (C.T. 8) The case was settled pending appeal by a payment to Meyers by Commercial Union Insurance Company, the insurer of Haberfelde Ford Company, of $2,875,000, and satisfaction of judgment was filed on August 6, 1974. (R.T. 21, C.T. 8)

On August 4, 1975, Commercial Union Insurance Company, respondent herein, as subrogee and express assignee of its assured Haberfelde Ford Company, commenced the instant action in the Superior Court of the State of California for the County of Santa Clara (No. 334379) against petitioner Ford Motor Company seeking to recover complete or partial equitable indemnity in respect of the $2,875,000

paid to John Meyers, on the theory that the injury to Mr. Meyers was caused wholly or in part by a manufacturing or design defect in the automobile manufactured by Ford Motor Company in which Mr. Meyers was injured. (C.T. 6) Process was served on Ford Motor Company twenty-two months later, on June 1, 1977. (C.T. 1)

On June 30, 1977, Ford Motor Company filed a timely petition for removal and caused this action to be removed to the United States District Court, Northern District of California. Jurisdiction of the District Court was based upon 28 U.S.C. §1332(a)(1) and the facts that the amount in controversy exceeded $10,000 and the action was between citizens of different states, in that Commercial Union Insurance Company was deemed to be a citizen of the State of Massachusetts (being organized and existing under the laws of that state and having its principal place of business in that state), and Ford Motor Company was deemed to be a citizen of the States of Delaware and Michigan (being organized and existing under the laws of the State of Delaware and having its principal place of business in the State of Michigan). 28 U.S.C. §1332(c), (C.T. 1, 2).

After some preliminary skirmishing by way of motions to dismiss and for summary judgment, Ford Motor Company answered the complaint, denying its material allegations and asserting the defense, among others, that the dismissal of the Meyers action had been given to it in good faith and, pursuant to California Code of Civil Procedure §877, served to discharge Ford Motor Company from all liability for any contribution (or equitable indemnity) to any other persons who were tortfeasors with respect to Mr. Meyers, including Haberfelde Ford Company and its subrogee and assignee Commercial Union Insurance Company. (C.T. 155, 156)

Thereafter, Ford Motor Company moved for summary judgment on the basis of the dismissal by Meyers and Code

of Civil Procedure §877 (C.T. 160). By an order filed June 26, 1978, that motion was denied on the ground that there was a disputed issue of material fact, but bifurcation of the trial was ordered with the issue of the good faith of and effect of the dismissal to be tried first. (C.T. 436)

The case was called for trial to the court on the dismissal issues on October 30, 1978, Honorable Alfonso J. Zirpoli, Judge presiding, testimony was taken from James F. Boccardo, who had served as attorney for Mr. Meyers and had acted in his behalf in giving the dismissal, other evidence was received, and the case was submitted. (R.T. 14-48)

On December 13, 1978, Judge Zirpoli filed his Order Dismissing Action, discussing the applicable law, reciting the pertinent facts as he found them, concluding that the dismissal of the Meyers action discharged any liability Ford Motor Company might otherwise have had to indemnify Commercial Union Insurance Company, and ordering that the action be dismissed. (C.T. 445-449, Appendix pp. 12-16) Judgment was entered in conformity with the order on December 15, 1978. (Appendix p. 17) On January 3, 1979, Judge Zirpoli made an order modifying his order of December 13, 1978 to correct a typographical error: the word "relevant" at line 20 on page 5 was changed to "irrelevant". (C.T. 451, Appendix p. 18) Judge Zirpoli did not make any written findings of fact or conclusions of law other than those embodied in his Order Dismissing Action dated December 13, 1978.

The critical findings of fact made by Judge Zirpoli after trial, and after hearing and observing the testimony of the witness Boccardo and considering the other evidence, were as follows:

> "Finally, the essence of the dismissal in the instant case is that the tort victim determined in good faith what proportion of the injuries suffered was the fault

of defendant Ford, and allowed Ford to be dismissed from the case upon compensation for the injuries so determined to have been caused. What differentiates this case from *McGee, supra,* is simply that here the victim determined that Ford's proportion of fault was zero, and that therefore the price for dismissal would be nothing. That the victim also thought that the dismissal would provide a tactical advantage in the case against plaintiff's insured is therefore irrelevant.

"The court therefore determines that only good faith is required to permit a dismissed defendant in a tort action to assert that dismissal as a bar to indemnification.

"On the evidence presented at the initial phase of trial, the court determines that the agreement between Mr. Boccardo and counsel for Ford providing for dismissal of personal claims against Ford was entered into in good faith and was not the result of collusion." (C.T. 449 as modified by C.T. 451, Appendix pp. 15-16, 18)

Commercial Union Insurance Company filed a timely notice of appeal to the Court of Appeals for the Ninth Circuit from the judgment of the United States District Court, Northern District of California (C.T. 454), duly perfected the appeal, the matter was briefed, and oral argument was had. Jurisdiction of the Court of Appeals was based upon 28 U.S.C. §1291. On February 18, 1981, the Court of Appeals filed its opinion and judgment holding that the dismissal of the Meyers action did not relieve Ford Motor Company of liability to indemnify Commercial Union Insurance Company and reversing the judgment of the District Court. (Appendix pp. 1-8)

On March 9, 1981, Ford Motor Company filed a timely petition for rehearing and suggestion of rehearing *en banc*. On April 9, 1981, the Court of Appeals for the Ninth Circuit

issued an order modifying its opinion by deleting one sentence and changing another. (Appendix p. 9) On April 24, 1981, the Court of Appeals for the Ninth Circuit issued its order denying the petition for rehearing and suggestion for rehearing *en banc* and modifying its opinion in the same respects stated in its order of April 9, 1981. (Appendix pp. 10-11)

In its opinion, the Court of Appeals for the Ninth Circuit construed the applicable California law to be as follows:

> "Section 877 applies to settlement made in good faith only. Individuals not participating in the settlement are barred from seeking contribution only if the settling parties acted in good faith with respect to them. Hence, good faith of the dismissal alone is not sufficient. The dismissal must represent a settlement which is a good faith determination of relative liabilities. Only in this situation are both policies behind § 877 — equity and settlement — furthered. Under the section, therefore, a defendant seeking to avoid indemnification must show that the underlying settlement considered the relative liabilities of the various parties." (Appendix p. 5)

Ford Motor Company contends that the Court of Appeals erred in so construing the California law.

The Court of Appeals applied the law as stated above, not to the facts as found by Judge Zirpoli in the District Court, but rather to the following facts:

> "The record reveals that the decision to dismiss was substantially a tactical maneuver by plaintiff's attorneys. It does not reflect the cooperative decision-making between parties which is the earmark of settlement. *Nor does it reflect a consideration of relative liability*. This case involves $3,250,000 in damages. Even a slight probability of liability on Ford's part would warrant significant contribution. There was at

least one expert prepared to testify that there was a design defect.

"Moreover, a settlement, to the extent that it is dictated by the tactical advantage of removing a deep-pocket defendant because of the experts it could produce and the skilled trial attorneys it could retain, is not made in 'good faith' consideration of the relevant liability of all parties." (Appendix p. 6) (Emphasis added.)

The facts relied upon by the Court of Appeals were, of course, directly contrary to those found by Judge Zirpoli. Judge Zirpoli found that Meyers dismissed Ford in good faith after considering the proportional liabilities of the parties and finding that Ford had none. The Court of Appeals found that the dismissal did *not* reflect a consideration of relative liability, but was based on tactical considerations, and therefore was *not* in good faith. Had the Court of Appeals applied its version of the law to the facts as found by Judge Zirpoli, it should have affirmed the judgment of the District Court, rather than reversing. Ford Motor Company assigns the failure of the Court of Appeals to adhere to the facts as found by the District Court upon substantial evidence as error.

Matters Respecting State Court—Inapplicable.

Jurisdiction of Federal Courts.

Information respecting the jurisdiction of the United States District Court, Northern District of California, and the jurisdiction of the Court of Appeals for the Ninth Circuit is included in the statement of the case.

ARGUMENT

REASONS FOR THE ALLOWANCE OF THE WRIT.

Question 1 — Basing the Decision on Facts Different From and Opposite to the Facts Found by the Trial Court.

The writ should be granted because the Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. U.S. Sup.Ct. Rule 17(a).

The accepted and usual course of judicial proceedings which concerns us here is forcefully and explicitly prescribed by Rule 52(a), Federal Rules of Civil Procedure:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

That is not a meaningless rule lightly to be disregarded, for it goes to the heart of litigation.

> "The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact." *Labor Board v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659 (1948).

This Court has been diligent in requiring Courts of Appeals to adhere strictly to the requirements of Rule 52(a) and to refrain from trying the facts *de novo* on appeal. For example,

> ". . . the Court of Appeals . . . gave insufficient deference to the findings of the trial judge. . . .
>
> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the

findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence."

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 122 (1969).

Accord, *United States v. General Dynamics Corp.*, 415 U.S. 486, 508 (1973);

Roemer v. Maryland Public Works Bd., 426 U.S. 736, 758 (1975);

Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 417-418 (1977).

Despite the plain law prohibiting it from doing so, the Court of Appeals for the Ninth Circuit ignored the findings of fact made by the trial judge and based its decision on its own directly contrary version of the facts. That conduct of the Court of Appeals was wholly unjustified and improper.

At the trial of the case, the principal witness was James F. Boccardo, who had served as attorney for Mr. Meyers and had acted in his behalf in dismissing Ford Motor Company from the case in exchange for a waiver of costs. Mr. Boccardo testified to the effect that, when he came into the case shortly before trial, he analyzed the case, analyzed the door that had opened, analyzed the lock, concluded the lock was not defective, concluded that the repairs to the door by Haberfelde Ford Company had rendered the lock actuating mechanism inoperative with the result that, although Meyers had pressed down on the locking button, the door opened when Meyers grabbed the handle because the door was not and had never been locked at all. Mr. Boccardo testified that he decided that he did not have a case against Ford Motor Company, that he had a good case against Haberfelde Ford Company, and that Ford should be dismissed. Mr. Boccardo testified that he offered a dismissal to counsel for

Ford Motor Company in exchange for a waiver of costs, that the offer was accepted, and that the dismissal was executed. All of Mr. Boccardo's testimony is reproduced in the Appendix (pp. 19-31), but the following portion is of particular interest:

> "Q. You were asked a number of reasons for the dismissal. What was the primary reason you dismissed Ford?
>
> "A. Primary reason was that I wanted to win my client's case and I could do so against Habberfeld Ford, against whom I had a viable, provable theory, and I couldn't — I didn't think I could win against Ford. And there was no use or purpose in having Ford there except to create problems for me. I wanted him out.
>
> "THE COURT: Were you satisfied that there was no basis upon which they could be held?
>
> "THE WITNESS: Of course. If I thought they could have, I would have kept them in."
>
> (R.T. p. 28, lines 3-14).

The foregoing, and other similar testimony by Mr. Boccardo, was obviously believed by Judge Zirpoli, the trier of fact at the trial, and provided ample evidence to support his finding that:

> "Finally, the essence of the dismissal in the instant case is that the tort victim determined in good faith what proportion of the injuries suffered was the fault of defendant Ford, and allowed Ford to be dismissed from the case upon compensation for the injuries so determined to have been caused. What differentiates this case from *McGee*, *supra*, is simply that here the victim determined that Ford's proportion of fault was zero, and that therefore the price for dismissal would be nothing. That the victim also thought that the dismissal would provide a tactical advantage in the case

against plaintiff's insured is therefore irrelevant."

(C.T. 449 as modified by C.T. 451, Appendix pp. 16, 18).

Despite the express and fully supported finding of the trial court that the decision to dismiss was based upon a determination of the proportion of fault of Ford Motor Company (zero), the Court of Appeals grounded its decision on this directly opposite proposition: "Nor does [the decision to dismiss] reflect a consideration of relative liability." It bolstered that conclusion with the observation that the case involved $3,250,000, that even a slight probability of liability on Ford's part would warrant significant contribution, and that an expert was prepared to testify that there was a design defect.

The Court of Appeals simply ignored the findings of the trial judge. It did not analyze them and find them to be "clearly erroneous". Indeed, it could not have done so. Mr. Boccardo's testimony was that he thought he could not hold Ford Motor Company in. Under Mr. Boccardo's analysis of the facts, the door opened because the lock actuating mechanism had been rendered inoperative, and the door was never locked. Thus the lock never had a chance to function or to fail, and any defect that might have existed was not a cause of the door opening and could not be the basis for any liability of Ford Motor Company. If Mr. Boccardo is believed, the trial court's findings are fully supported, and the existence of testimony about a defect is not inconsistent therewith. The *only* way to reach the factual conclusions expressed by the Court of Appeals is to disbelieve Mr. Boccardo's testimony about his analysis of the case and what he thought the facts were. Whether to believe the witness is a matter for the trial judge, not the Court of Appeals.

This blatant deviation by the Court of Appeals from the accepted and usual course of judicial proceedings was not a matter of insignificance to the result, for if the facts found by the trial judge had been accepted, the Court of Appeals would have been compelled to affirm the judgment of the District Court, rather than reversing it.

The decision of the Court of Appeals added, we believe erroneously and contrary to California law, two new prerequisites to the application of California Code of Civil Procedure Section 877: (1) that the dismissal be pursuant to a "settlement", and (2) that the settlement considered the relative liabilities of the various parties. But regardless of whether the Court of Appeals was right or wrong on the law, the facts as found by the trial court fit precisely within the requirements of the Court of Appeals.

The first prerequisite, a "settlement," is necessarily satisfied by the agreement to dismiss the litigation against Ford Motor Company in exchange for a valuable consideration, the waiver of costs. While that consideration was less than enormous and Mr. Boccardo refused to characterize it as a "settlement" because no money was paid, surely the Court of Appeals did not hold that there could not be a settlement without the payment of money (consider mutual releases of cross-claims). Here Meyers received in settlement a waiver of costs, which was more than the zero he thought his case against Ford Motor Company was worth.

The second prerequisite, that the settlement consider the relative liabilities of the various parties, is fully satisfied by the trial court's findings, particularly that "here the victim determined that Ford's proportion of fault was zero, and that therefore the price for dismissal would be nothing." The trial judge could hardly have been more precise with his finding if he had had a copy of the opinion of the Court of Appeals in hand when he made it.

The Court of Appeals was thus presented with a situation in which it disagreed with the trial judge's view of the law as expressed in his Order, but in which, on the facts found by the trial judge, the result was correct. But instead of affirming the judgment of the District Court, the Court of Appeals ignored the findings of the trial judge, made its own diametrically opposite findings, and reversed the judgment.

Such blatant and gross deviation from the accepted and usual course of judicial proceedings prescribed by Rule 52(a) calls for a prompt and decisive exercise by this Court of its power of supervision over the Court of Appeals. We suggest that the controlling law is so clear and the conduct of the Court of Appeals is so obviously contrary to it that this case may appropriately be determined by issuing the writ of certiorari and summarily reversing the judgment of the Court of Appeals with instructions to affirm the judgment of the District Court. *E.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. (Prelim. Print) 643 (1980).

Question 2 — Error in Construing California Code of Civil Procedure §877.

Ford Motor Company believes the opinion of the Court of Appeals to be in error in its statement of the law with respect to the applicability of Code of Civil Procedure §877 in that no California case has said that a "settlement" is required in addition to the dismissal, release or covenants mentioned in the statute, no California case has asserted the proposition that the consideration for the settlement must reflect the comparative liabilities of the parties, and California cases seem inconsistent with those propositions. Compare *Dompeling v. Superior Court*, 117 Cal.App.3d 798, 173 Cal.Rptr. 38 (1981), and *Fisher v. Superior Court*, 103 Cal.App.3d 434, 163 Cal.Rptr. 47 (1980), with the

opinion of the Court of Appeals. We would be duly gratified if this Court would grant the writ of certiorari as to the statutory construction questions and correct the error of the Court of Appeals.

We recognize, however, that whether the Court of Appeals for the Ninth Circuit was right or wrong in its interpretation of the California law is not of major or lasting concern, beyond the interests of the immediate parties, in the administration of Federal justice. After all, the decision is no more than persuasive in the California state courts, and such courts are at entire liberty correctly to interpret the California law if and when a comparable question comes before them, with or without reference to, approval of, or disapproval of this decision of the Court of Appeals.

On the other hand, we suggest that the reluctance of this Court to embroil itself in questions limited to state law (as illustrated by the elimination of "has decided an important state or territorial question in a way in conflict with applicable state or territorial law" as a reason for review when Supreme Court Rule 19(b) was rewritten as Rule 17(a)) may tend to encourage Courts of Appeals to regard themselves as courts of last resort that are at liberty to decide state law cases on the basis of what they think the state law ought to be, rather than what the state courts have said it is. This Court may wish to take this opportunity to exercise its supervisory authority, disabuse the Court of Appeals of any such notions, and impress upon the Court of Appeals its obligations to follow (not make) state law in diversity cases.

Conclusion.

This case presents a gross departure by the Court of Appeals for the Ninth Circuit from the accepted and usual course of judicial proceedings respecting the fundamental matter of who shall find the facts and determine the cred-

ibility of witnesses. The Court of Appeals ignored the fully supported factual findings of the trial judge and grounded its judgment on diametrically opposite findings of fact which it could not have made without disbelieving the witness that the trial judge believed. In doing so the Court of Appeals usurped the most fundamental of the trial judge's functions, the judging of the credibility of witnesses. Such conduct requires that the Court exercise its supervisory power and discharge its supervisory duty.

The case also presents an excellent vehicle for the exercise of this Court's supervisory power. The issue is plainly presented. The applicable law and the violation are clear. The effect of the violation in inverting the rights of the parties is obvious. This Court can exercise its supervisory power and discharge its supervisory duty summarily, with minimum expenditure of time and effort, and without significantly increasing the burden of its calendar or interfering with the disposition of the other important matters before it. We suggest that it should do so by granting the writ of certiorari and summarily reversing the judgment of the Court of Appeals with directions to affirm the judgment of the District Court.

Respectfully submitted,

GEORGE RICHARD DOTY,
JONATHAN MARK GORDON,
GEORGE W. BULLEN,
JOSEPH J. DEHOPE, JR.,
Counsel for Petitioner
Ford Motor Company.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Commercial Union Insurance Company, Appellant, v. Ford Motor Company et al., Appellees. No. 79-4117.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 10, 1980. Decided Feb. 17, 1981.

Automobile dealership's insurer, which paid nearly $3 million in settlement of judgment in favor of plaintiff in personal injury action, brought action against automobile manufacturer seeking equitable indemnification. The United States District Court for the Northern District of California, Alfonso J. Zirpoli, J., entered judgment in favor of manufacturer, and insurer appealed. The Court of Appeals, Ferguson, Circuit Judge, held that trial court erred in finding that pretrial dismissal of auto manufacturer from action, which was dictated by tactical advantage of removing a deep-pocket defendant because of experts it could produce, was made in good-faith consideration of relevant liability of all parties; thus, California law did not prohibit dealership's insurer from seeking equitable indemnification from automobile manufacturer.

Reversed.

Appeal from the United States District Court for the Northern District of California.

Before GOLDBERG,* FERGUSON and BOOCHEVER, Circuit Judges.

---

*The Honorable Irving L. Goldberg, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

FERGUSON, Circuit Judge:

[1] John Meyers sued Ford Motor Company and Haberfelde Ford, Inc., a Ford dealership, for damages. He alleged that he sustained injuries proximately resulting from defendants' negligence in the manufacture, sale and service of his car.[1] He also asserted that both defendants breached implied warranties of safety. Immediately prior to trial, Meyers dismissed Ford as a defendant believing that he stood a better chance for recovery if Ford's expert witnesses did not testify and that there was scant likelihood of recovery against Ford. Meyers won and Haberfelde's insurer, Commercial Union Insurance Co., paid $2,875,000 in settlement of the $3,250,000 judgment.

Commercial Union then instituted the instant diversity suit against Ford for equitable indemnification. Ford defended on the basis of Cal.Code of Civ.Proc. § 877, which states:

> Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—
>
> (a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and

---

[1]Section 877 has been interpreted to apply to joint or concurrent tortfeasors responsible for the same tort. Hence, the fact that the allegations against defendants were not precisely the same does not prevent application of this section. *See, e.g., Jaramillo v. State*, 81 Cal.App.3d 968, 146 Cal.Rptr. 823 (1978); *De Cruz v. Reid*, 69 Cal.2d 217, 70 Cal.Rptr. 550, 444 P.2d 342 (1968).

(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

Ford claims its dismissal by Meyers was in good faith and that, as a dismissed party under § 877, it is not liable to Commercial Union for indemnification. Commercial Union counters that the dismissal was not a good faith settlement but rather a calculated tactical maneuver to which § 877 does not apply. The district court found in favor of Ford.

Reviewing the record, we find error in the district court's conclusion that a good faith settlement had taken place between Ford and Meyers. The court applied an erroneous test in making its decision. Accordingly, the judgment is reversed.

I.

[2,3] Section 877 of the California Code of Civil Procedure prevents parties from seeking contribution from settling defendants. It does not refer to indemnification, the related remedial doctrine sought in this case by Commercial Union.[2] Recognizing that allowance of liberal indemnification would undercut the finality provided by the section, however, the California Supreme Court has held that standards governing contribution under § 877 apply to indemnification as well. *American Motorcycle Ass'n v. Superior*

---

[2]Under California law, the right of contribution refers to the ability of one who has discharged more than his share of a common burden to compel his co-obligors to pay their proportionate share. 14 Cal.Jur.3d Contribution & Indemnification § 1. The obligation adheres only where judgment has been rendered against joint tortfeasors. *Winzler & Kelly v. Superior Court*, 48 Cal.App.3d 385, 395 (1975). In contrast, indemnity refers to the right of a party to be compensated for loss resulting from legal action taken against him or her. 4 B. Witkin, Summary of California Law § 50, at 18 (1980 Supp.).

Court, 20 Cal.3d 578, 604, 146 Cal.Rptr. 182, 578 P.2d 899 (1978).

[4] When we confront a situation not yet met by the California Supreme Court, we must seek the rule we believe that Court would adhere to were it confronted with a similar situation. *Takahashi v. Loomis Armored Car Service*, 625 F.2d 314, 316 (9th Cir. 1980). In interpreting the relation of § 877 to the doctrine of indemnification, we must therefore examine the extensive effort of the California courts to develop the state's remedial rules under that section. Recent cases demonstrate concern for two competing policies.

First, courts interpret § 877 as reflecting a policy in favor of settlement. The clear intent of § 877 is to allow a defendant who settles in good faith a claim against him to be forever discharged from liability by contribution or otherwise. *Stambaugh v. Superior Court*, 62 Cal.App.3d 231, 235, 132 Cal.Rptr. 843 (1976). Recognizing that a plaintiff has the power to preserve claims against those defendants with the greatest ability to pay or the least public sympathy, the courts have emphasized the requirement that a settlement with codefendants be a "good faith" release from liability. *See River Garden Farms, Inc. v. Superior Court*, 26 Cal.App.3d 986, 103 Cal.Rptr. 498 (1972).

Second, the California courts have developed an equitable rule allocating liability among tortfeasors in proportion to fault. *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975), applied the rule of comparative negligence to California tort cases. *American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899 (1978), developed a comparable rule of equitable indemnity. Aware that the ability of one defendant to seek indemnity from another could defeat the incentive

to settle, *American Motorcycle* found that the two policies need not be mutually exclusive. It held that under § 877, a tortfeasor who has entered into a good faith settlement should be released from liability for indemnification. *Id.* at 604, 146 Cal.Rptr. 183, 578 P.2d 899.

This court is bound by these two goals of California law—equity and settlement. "[I]f the policy of encouraging settlements is permitted to overwhelm equitable financial sharing, the possibilities of unfair tactics are multiplied. Neither statutory goal should be applied to defeat the other." *River Garden Farm, supra,* at 998, 103 Cal.Rptr. 498. Hence, the expansion of § 877 to prevent a party from seeking indemnification from another should apply only when the policy of settlement has been furthered and a settlement is made in good faith.

II.

In determining whether the policy of settlement has been furthered, we look to the conduct of the parties. When a plaintiff dismisses an action, the policy is furthered only when the dismissal resulted from a mutual decision to settle the dispute. At that stage of the inquiry, the testimony of counsel recounting the basis for dismissal is relevant.

[5] Section § 877 applies to settlement made in good faith only. Individuals not participating in the settlement are barred from seeking contribution only if the settling parties acted in good faith with respect to them. Hence, good faith of the dismissal alone is not sufficient. The dismissal must represent a settlement which is a good faith determination of relative liabilities. Only in this situation are both policies behind § 877—equity and settlement—furthered. Under the section, therefore, a defendant seeking to avoid indemnification must show that the underlying settlement considered the relative liabilities of the various parties.

When a suit is dismissed prior to trial and a party seeks indemnification, the liability of the dismissed defendant may not be indicated to the court. Thus, in order to prove that a settlement was negotiated in good faith, the dismissed defendant may have to present evidence concerning liability beyond that introduced in the original trial. The evidence would be limited to considerations that went into the settlement and were present at the time of the settlement.

III.

[6] The district court did not analyze Meyers' dismissal of Ford to determine, first, if a settlement had occurred and, second, if the settlement was made in good faith. Instead, the district court reviewed the testimony of plaintiff's counsel regarding the decision to dismiss Ford in order to decide whether, as between the plaintiff and Ford, it was a good faith dismissal. But an affirmative response to this question would not satisfy § 877, as it would not establish the existence of a settlement or the good faith required towards interested individuals not participating in the dismissal.

The record reveals that the decision to dismiss was substantially a tactical maneuver by plaintiff's attorneys. It does not reflect the cooperative decision-making between parties which is the earmark of settlement. Nor does it reflect a consideration of relative liability. This case involves $3,250,000 in damages. Even a slight probability of liability on Ford's part would warrant significant contribution. There was at least one expert prepared to testify that there was a design defect.

Moreover, a settlement, to the extent that it is dictated by the tactical advantage of removing a deep-pocket defendant because of the experts it could produce and the skilled trial attorneys it could retain, is not made in "good faith" consideration of the relevant liability of all parties. Ac-

cordingly, the court erred in finding that the settlement absolving Ford of any liability to Meyers was made in good faith. Haberfelde should be given its day in court to determine whether Ford is liable for partial indemnity.

As the California Court of Appeal noted in *River Garden Farms;*

> Any negotiated settlement involves cooperation, but not necessarily collusion. It becomes collusive when it is aimed to injure the interests of an absent tortfeasor. Although many kinds of collusive injury are possible, the most obvious and frequent is that created by an unreasonably cheap settlement. Applied *pro tanto* to the ultimate judgment, such a settlement contributes little toward equitable—even though unequal—sharing. As we noted earlier, unreasonably low settlements with the other tortfeasors and the fear of a large unshared judgment may propel the last remaining defendant into a settlement exceeding the plaintiff's remaining damages and transcending that defendant's equitable share. Prevention of collusion is but a means to the end of preventing unreasonably low settlements which prejudice a nonparticipating tortfeasor. The price of a settlement is the prime badge of its good or bad faith.

26 Cal.App.3d at 996, 103 Cal.Rptr. 498.

The policies served by § 877 are equity and the settlement of cases prior to trial. The ability of a court to achieve equity among parties should not be abridged absent proof that a true settlement has occurred. California courts acknowledge the control given a settling plaintiff over the party defendants and the concomitant danger to equitable considerations. If, as here, the dismissal appears to be little more than tactical maneuvering by the plaintiff, the losing defendant should

not be prevented from seeking equitable indemnification from a party who may be partially responsible.[3]

The judgment is REVERSED.

---

[3]Though we do not consider legislation enacted after the district court considered this case, we are encouraged in our result by the passage of California Code of Civil Procedure § 877.6 on July 17, 1980, which confirms our conclusion that a settlement must be made in good faith before a joint tortfeasor is prevented from seeking indemnification.

Order Amending Opinion.

United States Court of Appeals for the Ninth Circuit.

Commercial Union Insurance Company, Appellant v. Ford Motor Company, et al., Appellees. No. 79-4117. DC# C-77-1427-AJZ.

Filed: April 9, 1981.

Before: GOLDBERG,* FERGUSON and BOOCHEVER, Circuit Judges.

The opinion filed February 17, 1981 is modified as follows:

1. The following sentence in the first column on page 392 of the slip opinion is deleted:

> Under the section, therefore, a defendant seeking to avoid indemnification must show that the underlying settlement considered the relative liabilities of the various parties.

2. The following sentence in the second column on page 392 of the slip opinion is deleted:

> Thus, in order to prove that a settlement was negotiated in good faith, the dismissed defendant may have to present evidence concerning liability beyond that introduced in the original trial.

and the following sentence is inserted:

> Thus, where good faith is in issue, the parties may have to present evidence concerning liability beyond that introduced in the original trial.

---

*Hon. Irving L. Goldberg, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Order.

United States Court of Appeals for the Ninth Circuit.

Commercial Union Insurance Company, Appellant, v. Ford Motor Company, et al., Appellees. No. 79-4117. DC# C-77-1427-AJZ.

Filed: April 24, 1981.

Before: GOLDBERG,* FERGUSON and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Ferguson and Boochever voted to reject the suggestion for rehearing en banc and Judge Goldberg recommended such rejection.

The opinion filed February 17, 1981 shall be modified as follows:

1. The following sentence in the first column on page 392 of the slip opinion is deleted:

> Under the section, therefore, a defendant seeking to avoid indemnification must show that the underlying settlement considered the relative liabilities of the various parties.

2. The following sentence in the second column on page 392 of the slip opinion is deleted:

> Thus, in order to prove that a settlement was negotiated in good faith, the dismissed defendant may have to present evidence concerning liability beyond that introduced in the original trial.

and the following sentence is inserted:

> Thus, where good faith is in issue, the parties may have to present evidence concerning liability beyond that introduced in the original trial.

---

*Hon. Irving L. Goldberg, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

The full court has been advised of the proposal to amend the opinion and of the suggestion for en banc rehearing and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. The opinion filed February 17, 1981 is amended as set forth above.

Order Dismissing Action.

United States District Court for the Northern District of California.

Commercial Union Insurance Company, Plaintiff, vs. Ford Motor Company, et al., Defendants. No. C-77-1427 AJZ.

Filed: December 13, 1978.

Plaintiff in this case seeks indemnification from defendant for a judgment rendered against plaintiff's insured in state court for personal injuries. Defendant Ford Motor Company had also been named as a defendant in that suit, but on the day of trial the injured party had agreed to a dismissal of his claim against Ford. Defendant has asserted that dismissal of that action bars this suit for indemnity by plaintiff under California Code of Civil Procedure § 877 (West Supp. 1978), which provides:

> Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—
>
> (a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and
>
> (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

The court denied defendant's motion for summary judgment on this issue because it was unable to determine on the record before it whether or not the dismissal was in good faith. But at the same time it declined to accept the plaintiff's

theory that section 877 applies only to dismissals procured by the payment of valuable consideration. Instead, the court ordered the case bifurcated so that the good faith question could be determined prior to trial on the merits of the indemnity claim. (Order of June 26, 1978.)

The parties presented one witness at the initial phase of the trial, Mr. James F. Boccardo. Mr. Boccardo had been the attorney for the victim in the personal injury action. He testified that the reason he agreed to permit the dismissal of Ford in the state action was that he did not believe that his client could be victorious over Ford "on any viable theory." In addition, he noted that Ford was well stocked with experts prepared to testify and that Ford's counsel was a formidable opponent. Boccardo therefore determined that it would damage his case against plaintiff's insured if Ford remained as a defendant, and that his client would be better off proceeding solely against plaintiff's insured. Mr. Boccardo agreed with Ford's counsel that Ford could be dismissed provided that Ford would waive costs, although Mr. Boccardo testified that he would have permitted the dismissal even without such a waiver.

In addition to the testimony of Mr. Boccardo, plaintiff introduced certain documentary evidence, including records from the state court proceeding, and a few brief extracts of deposition testimony.

Plaintiff buttressed the legal arguments previously made by citations to two recent cases involving section 877, *Sears, Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492 (1978), and *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005 (1978). Plaintiff has argued that these cases should be engrafted to those considered on the summary judgment motion, particularly *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578 (1978), and *Lareau v. Southern Pacific Transportation Co.*, 44 Cal.

App. 3d 873 (1975), to produce a construction of section 877 that would require a *settlement* in good faith before further liability could be precluded. This result is said to be dictated by the repeated use of the word "settlement" by California courts in discussing the application of section 877.

The court is unable to accept plaintiff's construction of section 877 because such a reading would be contrary to the plain language of that statute, namely, that a "dismissal . . . given in good faith . . . to one or more of a number of tortfeasors claimed to be liable for the same tort . . . shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors." Although the statute speaks only of contribution, it has been read by the California Supreme Court as including indemnification as well. *American Motorcycle Association, supra.* While the court acknowledges that most of the cases discussing section 877 are cases in which a settlement has been tendered, the statute does not explicitly require this, nor does any California case to which the court has been referred state that section 877 applies only to dismissals given in settlement of a claim.

Plaintiff argues that to foreclose its suit for indemnity based upon a decision made between the tort victim and Ford is unfair. But in addition to the plain language of the statute, one of the very cases upon which plaintiff relies permitted a decision between the other parties to similarly affect the rights of a non-settling defendant. In *McGee v. Cessna Aircraft Co., supra,* the plaintiff alleged that her injuries were caused both by the owner and by the manufacturer of the aircraft in which she was riding. She was able to reach a settlement with the owner, but proceeded to trial against the manufacturer. After a jury verdict for the manufacturer, the District Court of Appeal reversed the trial

court for having improperly instructed the jury on the question of crashworthiness. The appellate court also determined that the jury should have been instructed to reduce the amount of its award only by the sum actually paid by the owner in settlement, and not, as defendant had contended, by an amount proportional to the owner's degree of fault as ascertained by the jury. This later ruling by the Court of Appeal means that where two defendants are named and one of the two settles, the remaining defendant is subject to liability for the entire balance of the damages regardless of its proportionate culpability. Thus, California law already permits an agreement between the plaintiff and one defendant to substantially affect the rights and liabilities of the other defendant. That is precisely the result reached by the court today.

In addition, plaintiff argues that this result would make it worse off than it would have been if Ford had never been named as a defendant, for then plaintiff would have remained free to bring a suit for an indemnity at a later date. But this result is not dissimilar to that which occurs in contribution situations, where joinder rules do not permit the addition of cotortfeasors not named by the plaintiff; as one commentator notes, "if the plaintiff, for personal reasons or otherwise, chooses not to press a claim against one or more tortfeasors, the remaining defendants may be forced to absorb the absent wrongdoer's share of liability." Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 Calif. L. Rev. 1264, 1267 (1977). If section 877 works to the disadvantage of would-be indemnitees, this at least makes them no worse off than those seeking contribution.

Finally, the essence of the dismissal in the instant case is that the tort victim determined in good faith what proportion of the injuries suffered was the fault of defendant

Ford, and allowed Ford to be dismissed from the case upon compensation for the injuries so determined to have been caused. What differentiates this case from *McGee, supra,* is simply that here the victim determined that Ford's proportion of fault was zero, and that therefore the price for dismissal would be nothing. That the victim also thought that the dismissal would provide a tactical advantage in the case against plaintiff's insured is therefore relevant.

The court therefore determines that only good faith is required to permit a dismissed defendant in a tort action to assert that dismissal as a bar to indemnification.

On the evidence presented at the initial phase of trial, the court determines that the agreement between Mr. Boccardo and counsel for Ford providing for the dismissal of personal claims against Ford was entered into in good faith and was not the result of collusion. Good cause appearing therefor,

IT IS HEREBY ORDERED that the action is dismissed with prejudice.

Dated: December 13, 1978

/s/ Alfonso J. Zirpoli
United States District Judge

Judgment.

United States District Court for the Northern District of California.

Commercial Union Insurance Company, Plaintiff, vs. Ford Motor Company, et al., Defendants. No. C-77-1427 AJZ.

Filed: December 13, 1978.

In accordance with the court's order dismissing action dated December 13, 1978,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that this action is dismissed with prejudice.

Dated: December 13, 1978

/s/ Alfonso J. Zirpoli
United States District Judge

Order Modifying Order of December 13, 1978.

United States District Court for the Northern District of California.

Commercial Union Insurance Company, Plaintiff, vs. Ford Motor Company, et al., Defendants. No. C-77-1427 AJZ.

Filed: January 4, 1979.

Line 20 on page five of this court's Order Dismissing Action, filed December 13, 1978, is hereby modified to read as follows:

"against plaintiff's insured is therefore irrelevant."

Dated: January 3, 1979

/s/ Alfonso J. Zirpoli
United States District Judge

Trial Testimony of James F. Boccardo.
October 30, 1978.

United States District Court for the Northern District of California.

Commercial Union Insurance Company, Plaintiff, vs. Ford Motor Company, et al., Defendants. No. C-77-1427 AJZ.

James F. Boccardo,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bullen:

Q. Mr. Boccardo, you are a practicing attorney of law and have been for a number of years?

A. Yes.

Q. And you are the senior partner of a firm in San Jose?

A. Right.

Q. And I won't bother to go into your long and illustrious trial history. Your deposition has already been filed of record in this case along with the other depositions of your partner, Mr. Lull, and of your adversary in this case, Mr. Allard.

And have you had an opportunity to review your deposition in that case?

A. Yes, I looked at it today.

Q. All right. Now, would you tell us, firstly, whether or not you were involved in the John Meyers' case in the decision to dismiss Ford Motor at the outset of that trial in the Superior Court of the County of Santa Clara?

A. Yes.

Q. And would you explain to the court your involvement in that decision to dismiss Ford?

The Court: Why don't we go slowly. You represented—

The Witness: The plaintiff, your Honor.

The Court: Plaintiff John Meyers; is that right?

The Witness: That's correct.

The Court: And the suit which you instituted was sued against whom?

The Witness; Ford Motor Car Company and Habberfeld Ford, a Ford agency in Bakersfield, California, who had made certain repairs to the car in question.

The Court: All right. And you instituted the suit and caused everybody to be served; is that right?

The Witness: Yes.

The Court: After you instituted the suit, did the insurance company become involved, too?

The Witness: Well—

The Court: In any way?

The Witness: They became involved as a real party in interest.

The Court: That's Commercial Union?

The Witness: Yes.

The Court: They were insurance carriers?

The Witness: I don't think I ever knew who the insurance carriers were particularly. I was dealing with counsel representing the respective defendants and didn't concern myself particularly with the identity of the carrier.

The Court: So, this action was pending against the Ford Motor and Habberfeld?

The Witness: That's correct.

The Court : All right. Now, go ahead, counsel.

Mr. Adler: Your Honor, I think we could stipulate, so it's clear, that Habberfeld Ford's insurer was Commercial Union.

Mr. Bullen: So stipulated.

The Court: All right.

Mr. Bullen: Q. Now, would you tell us how you became involved in this particular litigation?

A. All right. Any litigation of magnitude is generally in our office on my desk for trial sooner or later. Generally later. I wasn't involved in the discovery aspects of the case. But, this was a case that ultimately, when it was scheduled for trial, I became involved in it the week before trial.

I reviewed the file. I reviewed the depositions. Familiarized myself with the case. Became concerned that our case against Ford as developed, so-called, by the people in my office who had taken the depositions and who had enunciated their theories was of no merit.

So, I went out and I bought myself a Ford lock, which was the lock. I conducted certain experiments of my own and I had a degree in engineering before I went to law school; I knew something about mechanics. It became clear to me that this accident was caused solely and entirely by reason of a misfit in the interlining of the door and the steel portion of the door. Because, I believe, that my client was telling us the truth when he said he pressed down the plunger, which would cause the lock to lock. Nevertheless, the door opened, indicating that it was not locked.

Since I believed that he universely pressed, anytime you get into the car with the plunger, and I believe that he did on this occasion, there had to be an explanation for the door unlatching. Because the lock, in my opinion, was a perfectly, sound and well-designed lock.

So, while inspecting the door, and we had the door, I made certain observations on the door. And it became clear to me, at least, that what had happened is that the innerlining, which has a grout or a hole for this plunger to go through, has to coincide with the hole in the steel of which the door is made so that the plunger will go through those two gravits [phonetic] and permit the rod to go all the way.

The little knob that is on top of the rod extends beyond the diameter of the rod 240 — 240, some distance, if you follow me.

The Court: Yes.

The Witness: The little knob is of greater diameter than the rod.

The Court: Yes.

The Witness: Now, the Habberfeld Ford people had been asked by the plaintiff to repair a rattle or malfunction in the door. And instead of taking it apart and removing the interlining and resetting it properly, they took the expedient of putting a metal screw, which cost a fraction of a cent, through the interlining into the steel to hold the tube in proper acquisition, one to the other.

However, in the ensuing mileage of the car before the happening of the accident, it was my theory that that screw became somewhat dislodged so that the proper location of the two gravits was again distorted.

So, when my client plunged the plunger down, it did go down. But, only to the point where the excess adler [phonetic] would hit metal of the inner door and would not all the way close and lock the door.

So, he's asleep at the time the accident happens. He awakens as a car is fishtailing. And he grasps, according to his testimony, the door handle. Now, the latch is inside the door handle on this model. The door has something you

can grab. And inside that is a lever that opens and closes, opens a lock.

So, my idea, as was what happened, was when he grabbed the handle, the lock, not having been locked, the door not being locked because of the hangup, it opened and the centrifugal force of the car went one way and he went the other way, and his body was forced outside the door and the harness or seat belt on. So, when the car rolled over, his neck was fractured.

So, I couldn't see any chance — I had no faith, let's put it that way, in the jury holding Ford in connection with the design of the lock. And I dismissed them because I felt that I would eliminate a lawyer, a competent lawyer on the other side, myriad of experts that Ford Motor Car Company would supply on anything they needed by their beck and call by the lawyer handling the case.

And I felt that I would win the case against Habberfeld Ford much easier if I didn't have Ford in there. So, I determined to dismiss Ford and try the case against Habberfeld Ford. That's all there is to it.

So, when we met down at the courthouse a few days before the trial, or the beginning of the trial, I think it was a Friday, I told Allard, who represented Ford — oh, he probably said, "Why don't you let me out," or words to that effect. "I will. Do you want to waive costs? I'll let you out." He said, "Okay. It's a deal."

So, prepared dismissal. I signed it. So, we went to trial against Habberfeld Ford.

Mr. Bullen: Q. Mr. Boccardo, if I understand your testimony, there was no viable theory that you could see against Ford Motor Company?

A. As far as I was concerned, there was no viable theory of liability against Ford Motor Car Company. The agency

was — the lock was defective in design and manufacturing, and I had no way that I could prove that by credible evidence.

Mr. Bullen: That's all I have, your Honor. Thank you.

Mr. Adler: Your Honor, I have just a couple of questions. If I may, I would urge the Court that we are not now trying the defect portion of this case. We will eventually, and that, the Court understands, that I haven't objected to Mr. Boccardo's testifying on his beliefs because —

The Court: No, we are trying to ascertain good faith nature of this dismissal or settlement. Your contention is dismissal is not a settlement. Then, that's a legal question I'll pass on. All I'm interested right now is whether this was all in good faith.

Mr. Adler: Correct.

The Court: Or whether it was for the purpose of getting the benefit of something from Ford Motor, or something of that character.

Mr. Adler: Okay. All I'm suggesting is that I have no objection to this testimony coming in to show the reasons why Mr. Boccardo made his decision. But, not on the substance of the defect in the vehicle. We will try that issue at a later time, if we may.

All right.

Cross-Examination

By Mr. Adler:

Q. Mr. Boccardo, you didn't consider this a settlement, did you?

A. No, settlement, no.

Q. You know what a settlement of a case is?

A. Yeah, settlement you make a deal with somebody and you get something for it. You let them out.

Q. Is that what happened in this case?

A. No.

Q. Did you get any consideration?

A. I didn't want them in.

Q. Did you get any consideration of any kind in your mind for your dismissal?

A. No, unless you call a waiver of costs. But, I would have dismissed it whether he waived costs or not. As a matter of fact, I would have paid him to get out.

Q. And your decision to dismiss was a tactical decision, wasn't it?

A. It was.

Q. You felt to proceed with a defendant that you thought you couldn't succeed against was to a disadvantage of your client?

A. Correct.

Q. In the trial of the case?

A. Correct.

Q. And that's why you dismissed it?

A. I dismissed it because I felt that was the thing to do, to the best interest of my client, for the best interest of my client, in the best interests of my client.

Q. And the tactical reason you had in mind was the quality of your opponent?

A. One.

Q. How many arguments there would be against you?

A. Also.

Q. The voir dire of the witnesses?

A. Jurors, yes.

Q. With regard to the quality of the attorneys against you, didn't you believe that Mr. Allard was prepared and

Mr. La Riviera was not? You would have a better chance of succeeding?

A. I didn't know anything about La Riviera's preparation or lack thereof. I knew that Allard would be prepared and would have at his command all of the expertise of the Ford personnel.

Mr. Adler: I have no other questions. Thank you, Mr. Boccardo.

Redirect Examination

By Mr. Bullen:

Q. You were asked a number of reasons for the dismissal. What was the primary reason you dismissed Ford?

A. Primary reason was that I wanted to win my client's case and I could do so against Habberfeld Ford, against whom I had a viable, provable theory, and I couldn't — I didn't think I could win against Ford. And there was no use or purpose in having Ford there except to create problems for me. I wanted him out.

The Court: Were you satisfied that there was no basis upon which they could be held?

The Witness: Of course. If I thought they could have, I would have kept them in.

Mr. Bullen: Thank you very much.

Recross-Examination

By Mr. Adler:

Q. Mr. Boccardo, I have just a couple more along this line.

The decision you made at the end there as to dismissal is the kind of decision you make at various stages of a preparation of a case, isn't it?

A. Let's put it this way: Had I known what I knew at the time I got into the case, I would never have named Ford to begin with.

Q. It's just as if you hadn't sued them at all?

A. That's right.

Q. Very good.

A. I didn't want them in there. I wished they weren't there, and I had means of getting them out. And I got them out.

Mr. Adler: Thank you.

The Court: All right. I don't think there is anything I can add.

Mr. Bullen: Thank you very much, Mr. Boccardo.

The Court: Are you going to call any more witnesses, or is this the case?

Mr. Adler: Your Honor, I would like to offer some portions of Mr. Lull's deposition to support what Mr. Boccardo had said. Other than that, on behalf of the plaintiff, I have no other live witnesses, your Honor.

The Court: Whose deposition do you want?

Mr. Adler: Mr. Lull, Mr. Boccardo's partner.

The Witness: He is one of the gentleman who is in my office who participated in this decision.

Mr. Bullen: Judge, I think I called Mr. Adler because we were concerned that we might not get any of the lawyer witnesses here. And we agreed, I think, didn't we, Jack, that the depositions that were already on file in the case could, in effect, go into evidence here?

The Court: All right.

Mr. Bullen: And the only other thing I would ask at this point is I do have a whole certified file from San Jose which may or may not have been put into evidence. I want

to make sure that I get the actual dismissal into evidence. So, I'd like to submit that to the Court and put it in evidence.

The Court: Yes.

Mr. Bullen: Then I would like to incorporate as evidence in this trial on the facts, all of the record and documents and declarations heretofore filed in this case, which I think your Honor has already reviewed and you indicated you had thought should be part of the evidence here.

Mr. Adler: Your Honor, I'd object to the affidavits being part of the evidence here. The deposition, counsel were present and had an opportunity to cross-examine. And I've stipulated with Mr. Bullen that the depositions may go in. But, I would urge that the declarations that have been prepared without the opportunity to cross-examine would not be proper evidence in the case in deciding this issue, your Honor.

We have three depositions of the three parties involved; Mr. Allard, who was representing Ford, Mr. Boccardo and Mr. Lull. And I have no objection to them going in. I would like to put on the record a few quotations from some of that deposition, if that's agreeable with the Court, of Mr. Lull. Other than that, we have nothing else.

Mr. Bullen: Well I was going to read in portions of Mr. Lull's deposition and also Mr. Boccardo's. And that's no longer necessary. I don't know what your ruling is. And perhaps your Honor would want to reserve the ruling with respect to the declarations and affidavits previously filed in the Summary Judgment, depending upon the thrust of your consideration of this case factually.

I will, however, submit for marking a certified copy of the court documents of Santa Clara County in the underlying case of John Meyers versus Ford Motor and Habberfeld

Ford. And immediately above — below the certification by the court clerk, John Kasbaski, and affidavit identifying him by judge of the Santa Clara Court, is a copy of the endorsed file dismissal, just so that we have the record straight in that regard. I'd like to introduce that as one exhibit. It may already have been in the Court's possession. But, I would like to introduce it.

Mr. Adler: Your Honor, I have no objection to it being marked. I think there is much that is irrelevant, immaterial and to introduce it into evidence, make your Honor read this entire matter, is unnecessary. I have no objection to marking the request for dismissal as an exhibit for your Honor's reference and admit it in evidence. I will stipulate that Mr. Boccardo — may I approach the witness, your Honor?

The Court: Yes.

Mr. Adler: This is your signature?

The Witness: Yes, That's my signature.

The Clerk: Defendants' Exhibit A.

[Court documents of Santa Clara County in case of John Meyers received in evidence as Defendants' Exhibit A.]

Mr. Adler: That was filed on January 11, 1974?

The Witness: I don't know when it was filed. It was signed on January 11th, because that's my writing on the left.

Mr. Adler: The left is in your writing?

The Witness: Yes.

Mr. Adler: And the signature?

The Witness: Right.

Mr. Bullen: It shows an endorsed file stamp as of that date.

Mr. Adler: I'll stipulate to that, your Honor.

Mr. Bullen: Now, in regard to Mr. Adler's objection to the introduction of all these records, I didn't introduce them for the purpose of having them all read. But, I introduced them in evidence in case a certain issue is involved.

For instance, those records show all of the instructions which show very clearly that this case was tried only on one theory. And that was negligent maintenance and repair by Habberfeld Ford. There was no theory against Habberfeld Ford which would establish the liability because of some negligent or strict liability conduct on the part of Ford Motor Company. That is true, isn't it?

The Witness: That is correct.

Mr. Adler: Excuse me, your Honor. Not only am I going to object to the question at this point. Number two, it's totally irrelevant to the issue your Honor has to decide here, which is — and we ought to keep in mind —

The Court: I get a feeling that I have got enough now in the record for me to make my ultimate decision on what I bifurcated. Once I make the decision on what I bifurcated, if I conclude that this was a good faith dismissal and consequently situation arises in which, under the applicable provisions of the California Code, there is a release of the joint tort feasor, that answers it. I will make that ruling. And once that ruling is made, we will know.

If I say — if I conclude that Ford Motor is still in the case, I'll tell you. But, if I say they are out, they are out. And that ends the matter.

Mr. Adler: Correct, your Honor. I would ask an opportunity once we've agreed all the evidence is before The Court for perhaps fifteen minutes to be able to discuss our position in light of the evidence.

The Court: What more evidence is there?

Mr. Adler: I have none, except as I indicated, your Honor, I'd like to read a couple of portions from Mr. Lull's deposition.

The Court: Let's get them into the record. Is Mr. Boccardo excused?

Mr. Adler: Yes, and with our thank you.

The Witness: May the Good Lord keep you well.

List of Subsidiaries (Other Than Wholly Owned Subsidiaries) and Affiliates of Ford Motor Company (U.S. Sup.Ct. Rule 28.1).

The principal United States and foreign affiliates and subsidiaries (other than wholly owned subsidiaries) of Ford Motor Company are as follows:

United States:

Eveleth Taconite Company and Humboldt Mining Company.

Foreign:

Ford Motor Company (Belgium) N.V.; Ford Motor Company of Canada Ltd.; Ford Motor Company A/S
(Denmark); O/Y Ford A/D (Finland); Ford-Werke Aktiengesellschaft (Germany); Ford Nederland N.V. (Holland); Hokkai Ford Tractor Co. Ltd. (Japan); Ford Motor Company Aktiebolag (Sweden); Ford Lio Ho Motor Company Ltd. (Taiwan).

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth in the following list. The list was accurate as of April 30, 1981, and is the most current listing available:

Bob Beard Ford	Augusta, Georgia
Deland Ford/Mercury	Deland, Florida
Lewis Dyer Ford/Mercury	Lafayette, Georgia
Steve Harris Ford	LaGrange, Georgia
Heritage Ford/Mercury	Laurinburg, North Carolina
Billy Howell Ford	Cumming, Georgia
Kings Colonial Ford	Brunswick, Georgia
King's Crown Ford	Jacksonville, Florida
Bo Lovein Ford	Nashville, Georgia
Lynchburg Ford	Lynchburg, Virginia

Marshall Mize Ford	Chattanooga, Tennessee
Miracle Ford	Galatin, Tennessee
Mountain View Ford	Chattanooga, Tennessee
Nelson Ford	DeFuniak Springs, Florida
Ed Sherling Ford	Enterprise, Alabama
Sloan Ford Lincoln Mercury	Columbia, Tennessee
Bob Williams Ford	Homerville, Georgia
Wayne Blackwood Lincoln Mercury	Rome, Georgia
San Johnson Lincoln Mercury	Charlotte, North Carolina
Riverside Lincoln Mercury	Madison, Tennessee
Cortland Ford Sales	Cortland, New York
Roger Karns Ford	Oneonta, New York
Stan Martin Ford	Hudson, New York
Metro Ford Sales	Schenectady, New York
Roberts Motor Sales	Attleboro, Massachusetts
Shiretown Ford	Plymouth, Massachusetts
Wayne Ford	St. Johnsbury, Vermont
Andrews Lincoln Mercury	New Bedford, Massachussets
Bay State Lincoln Mercury	Framingham, Massachusetts
Merrimack Lincoln Mercury	Methuen, Massachusetts
Rurman Lincoln Mercury	Westbrook, Maine
Olde Towne Lincoln Mercury	Windsor, Connecticut
Pride Lincoln Mercury	Lynn, Massachusetts
Springfield Lincoln Mercury	Springfield, Massachusetts
Atchley Ford	Omaha, Nebraska
Borchers Ford-Lincoln Mercury	Rhinelander, Wisconsin
Century Ford Sales	Arlington Hts., Illinois
Don Courtney Ford Mercury	Sandwich, Illinois
Erdman/Willkomm Ford	Manitowoc, Wisconsin
Dee Harrison Ford	Monmouth, Illinois
Highland Park Ford	Highland Park, Illinois
Karp's Ford Sales	Houghton, Michigan
Al Piemonte Ford Sales	Melrose Park, Illinois

Rock River Ford	Rockford, Illinois
Totten-Evert Ford/Lincoln Mercury	Marquette, Michigan
Willowbrook Ford	Willowbrook, Illinois
Bell Lincoln Mercury Sales	Highland Park, Illinois
Joe Carini Lincoln Mercury Sales	Waukesha, Wisconsin
Lake-Line Motors	Kenosha, Wisconsin
Libertyville Lincoln Mercury Sales	Libertyville, Illinois
Hundley Ford	Providence, Kentucky
Landmark Ford Sales	Hamilton, Ohio
Bill McCoy Ford	Muncie, Indiana
Dick Ruhl Ford Sales	Columbus, Ohio
Shoemaker-Finch Ford	Springfield, Ohio
Ernest White Ford	Delaware, Ohio
Astley Lincoln Mercury	Chillicothe, Ohio
Columbia Lincoln Mercury	Indianapolis, Indiana
Jim Dixon Lincoln Mercury	Fairfield, Ohio
Fort Wayne Lincoln Mercury	Fort Wayne, Indiana
Metropolitan Lincoln Mercury	Louisville, Kentucky
Taylor Lincoln Mercury Sales	Cincinnati, Ohio
Blue Springs Ford	Blue Springs, Missouri
Ben Garner Ford/Mercury	Starkville, Mississippi
McClellan Ford	Amarillo, Texas
Middlekauff Ford	Dallas, Texas
North Central Sales	Richardson, Texas
One Moore Ford	No. Little Rock, Arkansas
Ron Roberts Ford	Wichita Falls, Texas
Gus Shaffar Ford	Joplin, Missouri
Southwest Ford	Oklahoma City, Oklahoma
Stuard Ford	Ferriday, Louisiana
Bob Higgins Lincoln Mercury	Texas City, Texas
Alpena Ford/Lincoln Mercury	Alpena, Michigan
Al Bennett Ford	Flint, Michigan
Dick Boyd Ford	Ludington, Michigan

Candy Ford/Mercury	Charlotte, Michigan
Mel Farr Ford	Oak Park, Michigan
Friendly Ford	Monroe, Michigan
Greenville Ford/Lincoln Mercury	Greenville, Michigan
Tom Holzer Ford	Farmington, Michigan
Glenn Lakey Ford	Muskegon, Michigan
Bill Laskey Ford	Milan, Michigan
Lou McKernan Ford	Battle Creek, Michigan
Montrose Ford	Akron, Ohio
Renaissance Ford	Detroit, Michigan
Tom Sheridan Ford	Bryan, Ohio
Bob Snider Ford	Orrville, Ohio
University Ford	Bowling Green, Ohio
Varsity Ford	Ann Arbor, Michigan
Fred Drendall Lincoln Mercury	Pontiac, Michigan
Jim Naud Lincoln Mercury	Lima, Ohio
Plainfield Lincoln Mercury	Grand Rapids, Michigan
Avalon Ford	Carson, California
Mel Burns Ford	Long Beach, California
Frank Coletto Ford	Harbor City, California
Huntington Motors	Arcadia, California
Allen Kane Ford	North Hollywood, California
Keystone Ford	Norwalk, California
Manhattan Ford	Manhattan Beach, California
Rio Hondo Ford	Montebello, California
Tate Ford Lincoln/Mercury	Holbrook, Arizona
Hollywood Lincoln Mercury	Hollywood, California
Carson Lincoln Mercury	Carson, California
Proto Lincoln Mercury	Huntington Beach, California
Best Ford, Inc.	Queens Village, New York
Dan Buckey Ford	Spring Valley, New York
C & C Motors	Horsham, Pennsylvania
Doran Ford	Union, New Jersey

Empire Ford	Mount Vernon, New York
Family Ford	Netcong, New Jersey
Gateway Ford	Ozone Park, New York
Hopkins Ford	Jenkintown, Pennsylvania
Manhattan Ford/Lincoln Mercury	New York, New York
Marple Ford	Broomall, Pennsylvania
Northport Ford	East Northport, New York
Popular Ford	Brooklyn, New York
Bob Thomas Ford	Hamden, Connecticut
Tonyes Ford	Haverstraw, New York
White Plains Ford	White Plains, New York
John Demolet Lincoln Mercury	Springfield, Pennsylvania
New Rochelle Lincoln Mercury	New Rochelle, New York
North Star Lincoln Mercury	Poughkeepsie, New York
Century Ford	Rockville, Maryland
Champion Ford	Baltimore, Maryland
Rick Hunt Ford	Warrenton, Virginia
Kuhns-Harnish Ford	Mechanicsburg, Pennsylvania
Ramsey-Sturman Ford	Pittsburgh, Pennsylvania
Target Ford	Monroeville, Pennsylvania
Tower Ford	Baltimore, Maryland
Tristate Ford	Elkton, Maryland
Woltz & Wind Ford	Heidelberg, Pennsylvania
Ed Taylor Lincoln Mercury	Amherst, New York
Fitzgerald Ford	Gig Harbor, Washington
Hilltop Ford Sales	Richmond, California
Jim Houston Ford	Seattle, Washington
Lebanon Ford	Lebanon, Oregon
Pittsburg Ford	Pittsburg, California
San Bruno Ford	San Bruno, California
Seekins Ford/Lincoln Mercury	Fairbanks, Alaska
John Stribling Ford	Klamath Falls, Oregon
Burlingame Lincoln Mercury	Burlingame, California

Diablo Lincoln Mercury	Concord, California
Dan Neja Lincoln Mercury	Yuba City, California
River City Lincoln Mercury	Sacramento, California
San Francisco Lincoln Mercury	San Francisco, California
Shen Lincoln Mercury	Vallejo, California
Wyatt Lincoln Mercury	Redding, California

Office-Supreme Court, U.S.
FILED
AUG 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-6

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

FORD MOTOR COMPANY,
Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. SHLEGEON
COUNSEL OF RECORD
JACQUES M. ADLER
ROBERT A. SHLEGEON, INC.
300 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 788-4844
Attorneys for Respondent
Commercial Union
Insurance Company

LEGAL-PRESS WALSH • 550 SIXTH ST. • S.F., CA 94103 • (415) 864-6500

TABLE OF AUTHORITIES CITED

Case

Page

American Motorcycle Association v. Superior Court, 20 Cal. 3d 578 (1978) 4, 5, 6, 8

Statutes

California Code of Civil Procedure:

Section 877 ..... 3, 5

Section 877(a) 3, 7

Section 877(b) 3

Section 877.6 7

Section 877(c) 7

Other Authority

The Legislative Counsel's Digest to Chapter 562 of California Statutes 1980 7

No. 81-6

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

FORD MOTOR COMPANY,
Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANY,[1]
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ford's petition fails to show any basis whatsoever for review by this Court of the Ninth Circuit's decision in this matter. The case does not involve any issue of Federal or Constitutional law. It simply involves a question of California law; and it is both ironic and the height of audacity that the party which chose to remove this case from the California court where it was filed now claims that the highest Court in this land should exercise its

[1]Parent, Subsidiary (except wholly-owned) and Affiliated Corporations of Commercial Union Insurance Company.

Parents

1. Commercial Union Assurance Company Limited (CUAC)

A publicly owned corporation incorporated under the Laws of the United Kingdom of Great Britain.

2. Commercial Union Corporation (CUC)

A Delaware holding company, 100% owned by CUAC.

power of supervision to review a matter solely involving state law.

Ford claims that the Court of Appeal erred in its construction of California law in holding that California Code

---

3. Commercial Union Insurance Company (CUIC)
A Massachusetts insurance company, 100% owned by CUC.

Subsidiaries (except wholly-owned)

1. Hairdressers Agency, Inc.
A New York corporation, 68.18% owned by CUIC.
2. Echlin, Irvin & Crowell & Co.
A Texas corporation, 20% owned by CUIC.
3. Bishop Insurance Agency, Ltd.
A Hawaii corporation, 44% owned by CUIC.

Affiliates

(Sister corporations directly owned by CUC, the immediate parent of CUIC)

1. Commercial Union Leasing Corporation.
2. American Employers' Insurance Company.
3. Commercial Union Risk Management, Inc.
4. Beacon Advertising Corporation.
5. CU Homeland Insurance Company.
6. CU Special Risks, Inc.
7. The Employers' Fire Insurance Company.
8. The Northern Assurance Company of America.
9. Beacon Risk Management Service, Inc.
10. Egret Holding Corporation.
11. CU Commercial Lines, Inc.
12. CU Personal Lines, Inc.
13. Special Underwriting Group, Inc.
14. CU Automation Services, Inc.
15. Commercial Union Investment Management Corporation.

of Civil Procedure Section 877 applies only to settlements made in good faith. A plain reading of the statute, however, demonstrates that Section 877(b) must be read in conjunction with Section 877(a).[2] The two subsections are joined by the word "and"; and the Ninth Circuit correctly held that the California Legislature intended that a dismissed defendant obtain immunity from contribution or indemnification only where the dismissal was given pursuant to a good faith settlement. Where there has been no settlement which would entitle the non-settling defendant to a set-off in the claim against him, the dismissed defendant is not entitled to immunity. Where Section 877(a) cannot be applied because there has been no money paid, Section 877(b) should not be applied. Otherwise, the dismissed defendant obtains a windfall and the non-dismissed defendant bears the full burden of the loss which was the proper responsibility of both parties. The Ninth Circuit properly noted that the dismissal of Ford was made solely for tactical reasons. It was made solely to enable Meyers to secure a larger recovery against respondent's insured,

---

[2]Code of Civil Procedure Section 877 states:

"Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before a verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—

(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; *and*

(b) It shall discharge the tortfeasor to whom it has given from all liability for any contribution to any other tortfeasors." (emphasis added)

Haberfelde. Under these circumstances, the Ninth Circuit properly held that respondent was entitled to its day in court in order to seek partial indemnity for a loss which the evidence will show was caused in part by Ford Motor Company.

Under California law, the plaintiff could pick and choose the tortfeasor against whom he wished to proceed; and under California law each tortfeasor is jointly and severally liable for the plaintiff's damages. (*American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578 (1978)) However, it is equally clear that under California law one tortfeasor has a right to seek equitable partial indemnification from another tortfeasor. (*American Motorcycle Association v. Superior Court, supra*) In *American Motorcycle*, the California Supreme Court adopted a rule "designed to stimulate responsibility throughout the merchandising chain." (20 Cal. 3d 578 at 596) It adopted a rule which requires both parties, the manufacturer and the dealer, to share the loss. In so ruling, the California Court found that "the basic objective of the contribution statute" was to further "an equitable distribution of loss among multiple tortfeasors." (20 Cal. 3d at 584) While the Court held in *American Motorcycle* that a good faith settlement by a settling defendant discharges that party from any claim for equitable indemnity, the Court did not hold that a dismissal without a settlement bars a claim for equitable indemnity. Indeed, that would frustrate the entire focus of the Court's decision—the equitable sharing of loss on a comparative fault basis.

Ford has claimed that the Ninth Circuit ignored findings of fact made by the trial judge. That is not true. The trial

court made no findings of fact. Rather it ruled as a matter of law that a settlement was not necessary for the dismissed defendant to obtain immunity from a subsequent action for partial indemnification. (C.R. 447:5-16) The Ninth Circuit disagreed with the lower court opinion and correctly held that under California law, a dismissal which is not given pursuant to a settlement but is furnished for tactical reasons to assist the plaintiff in prevailing in his action against a non-dismissed party should not bar a subsequent action for partial indemnification against a joint and concurrent tortfeasor. In our view, the Ninth Circuit was eminently correct since it is contrary to principles of fundamental fairness and justice for a party's rights to be deprived by the solely self-interested action of his adversary.

The Ninth Circuit did not err in construing California Code of Civil Procedure Section 877. Mr. Boccardo admitted that he had not entered into any settlement with Ford.[3] His decision to dismiss Ford was a tactical decision, which he made in the interest of *his client* in order to have a better chance of recovery against respondent's insured. Respondent does not question the right of plaintiff's coun-

---

[3]Both Mr. Boccardo and his partner, Mr. Lull, testified that they did not consider this a settlement. (R.T. 26:6-8; 36:12-14) The trial court did not find that there was a settlement. Instead, as noted above, the District Court specifically rejected respondent's argument that a settlement was necessary before Code of Civil Procedure 877 could be applied (C.R. 447:5-16) The Ninth Circuit properly held that the District Court was in error; and that the California Legislature only intended to grant immunity from a claim for equitable indemnity where there has been a settlement in good faith and not merely a dismissal in good faith.

sel to dismiss a defendant for whatever reasons counsel may have; but Mr. Boccardo's decision—made in the interests of his own client—should not be determinative of the rights of his adversary. All that respondent asks for and the Ninth Circuit held was that respondent has the right to litigate whether Ford Motor Company was negligent and whether it manufactured and designed a defective vehicle which contributed to the injuries sustained by John Meyers. Under *American Motorcycle Association v. Superior Court, supra,* it is clear that if Mr. Boccardo had not sued Ford, Haberfelde would have a right to seek partial indemnification from Ford on a comparative fault basis. Indeed, this is the very holding of *American Motorcycle,* since the Court in that case held that the American Motorcycle Association was entitled to file a cross-complaint for partial indemnity against the plaintiff's parents. If Ford's position were correct, a plaintiff could subvert the decision of the California Supreme Court by the artifice of naming a defendant in the complaint and then dismissing the complaint without the requirement of a good faith settlement.

If Ford's position were upheld, it would mean that an alleged wrongdoer has no right of redress from another alleged wrongdoer. It would mean that the plaintiff has sole control as to who does and who does not pay for a loss, notwithstanding the circumstances of the loss or the fact that the plaintiff really has no legitimate interest in the apportionment of responsibility between tortfeasors, particularly where, as here, the plaintiff has maximized his recovery at the expense of one party without any contribution from the other party which might be credited to the

remaining defendant under Code of Civil Procedure Section 877(a). If Ford had obtained its dismissal as part of a "good faith settlement", it would not be liable for comparative indemnity. In such a situation, however, the claim against Haberfelde would have been reduced by the amount of the consideration paid by Ford. That did not occur in the instant case. Ford paid nothing to the plaintiff and Haberfelde received no credit. The California Legislature in enacting Code of Civil Procedure Section 877.6 confirmed the Ninth Circuit's conclusion that a settlement must be made in good faith before a joint tortfeasor is prevented from seeking indemnification.[4]

The Ninth Circuit's interpretation of California law was correct. The Court properly followed and applied the principles enunciated in the California cases; and it correctly interpreted the statute in question. A holding that would permit a plaintiff to dismiss a defendant (without a true settlement) and thereby deprive another defendant from

---

[4]The Legislative Counsel's Digest to Chapter 562 of California Statutes 1980 states:

> "Existing law provides, relative to a case involving alleged multiple tortfeasors, that a tortfeasor who has entered into a good faith settlement with a plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor, but does not specify whether such discharge must occur before or after trial as to the plaintiff and the remaining joint tortfeasors."

This supports our argument that the Legislature intended that the discharge from claims for partial or comparative indemnity only apply to tortfeasors who have entered into a good faith *settlement*. Indeed, Code of Civil Procedure Section 877.6 (c) by its own terms only applies where there has been a "settlement . . . made in good faith".

its rights to obtain equitable sharing of the loss would amount to a complete frustration and subversion of the principles enunciated by the California Supreme Court in *American Motorcycle Association v. Superior Court.* The decision of the District Court was unsound, inequitable and erroneous; and the Ninth Circuit properly reversed the judgment of the District Court.

CONCLUSION

For the reasons set forth above, respondent respectfully prays that the petition for writ of certiorari should be denied.

Dated, August 18, 1981
San Francisco, California.

Respectfully submitted,

ROBERT A. SELIGSON
COUNSEL OF RECORD
JACQUES M. ADLER
Counsel for Respondent
Commercial Union
Insurance Company

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-6
IN THE

Supreme Court of the United States

October Term, 1981

FORD MOTOR COMPANY,

Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANY,

Respondent.

Reply and Supplemental Brief in Support of Petition for Writ of Certiorari.

GEORGE RICHARD DOTY,
JONATHAN MARK GORDON,
600 Wilshire Blvd.,
Los Angeles, Calif. 90017,
(213) 624-2400,
and
GEORGE W. BULLEN,
JOSEPH J. DEHOPE, JR.,
555 Capitol Mall, Suite 1590,
Sacramento, Calif. 95814,
(916) 444-3495,
Counsel for Petitioner
Ford Motor Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

Question 1 — Basing the Decision on Facts Different From and Opposite to the Facts Found by the Trial Court 1

Question 2 — Error in Construing California Code of Civil Procedure § 877 3

Conclusion 3

APPENDIX. Opinion of Cardio Systems, Inc. v. The Superior Court of Fresno County. (Cited as 81 Daily Journal D.A.R. 2593, C.A. 5th, August 21, 1981) ..... App. p. 1

TABLE OF AUTHORITIES

Case

Cardio Systems, Inc. v. Superior Court, 81 Daily Journal D.A.R. 2593 (C.A. 5th, August 21, 1981) 3

Statute

California Code of Civil Procedure, Sec. 877 3

No. 81-6

IN THE

Supreme Court of the United States

October Term, 1981

FORD MOTOR COMPANY,

Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANY,

Respondent.

Reply and Supplemental Brief in Support of Petition for Writ of Certiorari.

Petitioner Ford Motor Company submits this brief in reply to the brief in Opposition to Petition for Writ of Certiorari filed by respondent Commercial Union Insurance Company and to bring to the attention of the Court a decision of the Court of Appeal of the State of California, Fifth Appellate District, which was rendered after the petition for writ of certiorari was filed.

Question 1 — Basing the Decision on Facts Different From and Opposite to the Facts Found by the Trial Court.

Our principal point is that, by ignoring the facts found by the trial court and basing its decision on its own directly contrary factual findings, the Court of Appeals so departed from the accepted and usual course of judicial proceedings

as to call for an exercise of this Court's power of supervision. Respondent did not directly respond to that point. It did, however, assert (Respondent's brief pp. 4-5) that the trial court made no findings of fact. Ford acknowledges that Judge Zirpoli did not make *formal* findings of fact. We suggest, however, that the trial court was making a fact finding in the portion of the Order Dismissing Action (App.* 15-16) which it characterized as "the essence of the dismissal in the instant case":

> "[T]he tort victim determined in good faith what proportion of the injuries suffered was the fault of defendant Ford, and allowed Ford to be dismissed from the case upon compensation for the injuries so determined to have been caused . . . . [H]ere the victim determined that Ford's proportion of fault was zero, and that therefore the price for dismissal would be nothing."

The foregoing is a "finding of fact" and must be treated as such. That conclusion is required by the context, is supported by the reference (App. 12) to the motion for summary judgment which could not be decided without trial, and is confirmed by the wholly different phraseology used by the trial court (App. 13) in summarizing evidence.

The plain fact is that the Court of Appeals decided the case on its version of the facts, rather than the facts found by the trial court, and as a result it reversed the judgment of the trial court rather than affirming it. That was error which constituted such a departure from the usual and accepted course of judicial proceedings as to call for correction by this Court through the exercise of its powers of supervision.

---

*Appendix to Petition.

Question 2 — Error in Construing California Code of Civil Procedure § 877.

Ford's position that the decision of the Court of Appeals constituted a substantial departure from California law with respect to the effect of Code of Civil Procedure section 877 is confirmed by the decision of the Court of Appeal of the State of California, Fifth Appellate District, No. 5 Civil 6260, entitled *Cardio Systems, Inc. v. Superior Court*, filed August 21, 1981. The case has not yet been officially reported. Its text, taken from the Los Angeles Daily Journal Daily Appellate Report of August 28, 1981, is reproduced in the Appendix hereto.

The decision in *Cardio Systems, supra*, was on all fours with and diametrically opposed to the decision of the Court of Appeals in this case. It held that a dismissal given in consideration of a waiver of costs was a bar to a claim for partial equitable indemnity where the sole reason for the dismissal was the tactical decision that a malpractice recovery against a hospital would be easier if the case was not cluttered with a products liability case against the manufacturer of equipment used by the hospital, and the dismissal was given even though plaintiff's counsel thought the products case against the dismissed party was a good one. Although the *Cardio Systems* court was not pleased with the result, it deemed itself bound to follow the California law, rather than remaking it to suit its tastes. The Court of Appeals here had no such compunctions.

Conclusion.

We suggest again that the departures of the Court of Appeals from the proper course of judicial conduct and from the law are so fundamental, so plain and so simple that this Court can and should exercise its powers of supervision, grant the writ of certiorari, and summarily reverse the judg-

ment of the Court of Appeals with instructions to affirm the judgment of the District Court.

Respectfully submitted,

GEORGE RICHARD DOTY,
JONATHAN MARK GORDON,
GEORGE W. BULLEN,
JOSEPH J. DEHOPE, JR.,
Counsel for Petitioner
Ford Motor Company.

APPENDIX.

Opinion of Cardio Systems, Inc. v. The Superior Court of Fresno County (Cited as 81 Daily Journal D.A.R. 2593, C.A. 5th, August 21, 1981).

In the Court of Appeal of the State of California, Fifth Appellate District.

Cardio Systems, Inc., et al., Petitioners, v. The Superior Court of Fresno County, Respondent; Valley Children's Hospital and Guidance Clinic et al., Real Parties in Interest. 5 Civil No. 6260 (Super. Ct. No. 205038-3).

ORIGINAL PROCEEDING; application for a writ of mandate. Writ granted.

Foley, McIntosh & Foley and James G. Claytor for Petitioners.

No appearance for Respondent.

Stammer, McKnight, Barnum & Bailey and Carey H. Johnson for Real Party in Interest Valley Children's Hospital and Guidance Clinic.

No appearance for Real Party in Interest Cardiovascular Instruments, Inc.

Petitioners seek a writ of mandate ordering the trial court to vacate an order of March 23, 1981, entered against them on their defense of a good-faith dismissal as a bar to cross-complainant Valley Children's Hospital and Guidance Clinic (Hospital's) claim for equitable indemnity. (Code Civ. Proc., § 877.)

The trial court ruled that the dismissal, for costs, of petitioners in plaintiffs' action for wrongful death is not a bar under Code of Civil Procedure section 877, to Hospital's continuing action on its cross-complaint for partial equitable indemnity.

Plaintiffs Shirley Kafai, Shaharm Kafai, Bahram Kafai, Bahman Kafai, Shahla Kafai, Roya Kafai, Rana Kafai and Ali Kafai, widow and seven children of Manoocher Kafai, on July 9, 1976, filed an action (No. 205038-3) for damages in Fresno County Superior Court (respondent) for Mr. Kafai's wrongful death naming as defendants real party in interest Hospital, several doctors and several Does. A first amended complaint filed by stipulation of counsel on January 14, 1977, added petitioners Dennis Bethke, doing business as Life Support Systems, and Cardio Systems, Inc. (all hereafter Cardio), and real party in interest Cardiovascular Instruments Corporation (CINCO) as parties defendant. On December 15, 1978, by leave of court, Hospital filed a cross-complaint for partial indemnity against both Cardio and CINCO. On February 8, 1979, CINCO also cross-complained against Cardio for partial indemnity. Cardio answered the cross-complaints.

On April 26, 1979, plaintiffs filed a dismissal without prejudice as to Cardio; the consideration for the dismissal was a waiver of costs by Cardio.

On or about May 26, 1979, Hospital entered into an agreement with plaintiffs for "release of all claims" in consideration of the payment of $1 million to the plaintiffs. Plaintiffs subsequently dismissed all other parties who had appeared. Hospital and CINCO pursued their cross-complaints against Cardio.

Cardio, pursuant to an order of the court, amended its answers to include as an affirmative defense and bar to recovery for partial equitable indemnity a dismissal in good faith by plaintiffs. (Code Civ. Proc., § 877.) The trial court also granted Cardio's motion (Code Civ. Proc., § 597) for a separate trial of the affirmative defense under section 877 to be held before trial of the main action on the cross-complaints.

Trial by the court was held November 25 and 26, 1980. After hearing testimony and arguments of counsel, the judge ruled from the bench that, although he found "no collusion as that term is ordinarily understood . . . , to in any way injure the settling defendant [Hospital]," nor "bad faith in the usual concept of that term," he could not find the dismissal as to Cardio, which was without consideration other than the waiver of costs, a good faith dismissal as that concept is used in Code of Civil Procedure[1] section 877. The court ordered plaintiffs' action as to defendant CINCO dismissed because, although named in plaintiffs' amended complaint, CINCO was never served. (Code Civ. Proc., § 581a, subd. (a).)

Findings of fact and conclusions of law were requested at the close of the judge's ruling; they were signed March 23, 1981, and lodged with this court April 2, 1981.

In the interim, on February 18, 1981, Cardio filed a petition for writ of mandate in this court seeking to have the ruling of the trial court set aside. After various pleadings and points and authorities were filed, copies of the court's findings were lodged, as well as a copy of plaintiffs' release of all claims against Hospital; an order to show cause issued April 20, 1981. CINCO remained in the action as a cross-defendant and cross-complainant, but is not a party to this writ proceeding.

The evidence produced at the trial showed that Mr. Kafai died on the operating table during open-heart surgery at Hospital. An embolism of the brain was caused when the heart-lung machine pumped air into a sump-line tube which was inserted in a catheter in the left ventricle of the patient's heart; an incorrect assembly allowed the tube to inject air

---

[1]Unless otherwise indicated, all statutory references shall be to the Code of Civil Procedure.

into the heart instead of creating a suction to remove blood from the patient.

Cardio was the distributor of the heart-lung machine; CINCO manufactured it; Bethke delivered it to Hospital and instructed the hospital staff as to its operation.

The perfusionist who operated the heart-lung machine during the Kafai surgery testified that she incorrectly attached the tubing that was designed to bring blood from the heart to be filtered, oxygenated and pumped back into the patient. It was her understanding that this error caused air to be pumped into Mr. Kafai's body.

Hospital's expert, Dr. Black, a product-safety and human-factors engineer, testified, as part of an offer of proof by counsel for Hospital, that in his opinion the CINCO heart-lung machine used in the Kafai operation was defective in several particulars. Dr. Black cited several safety factors which he felt were necessary to make the machine nondefective: a checklist for operating personnel; arrows on the tubing and the pump; a system of grommets which would mechanically prevent incorrect insertion of the tubing into the pump; and a one-way valve that would prevent air from being forced into a patient.

Hospital's counsel made a further offer of proof that his experts, if called, would testify that the machine was also defective in that it had an inadequate forward-reverse switch.

Plaintiffs' former counsel, Mr. Brazier, testified that the complaint was amended, immediately before the running of the one-year statute of limitations, to name Cardio and CINCO, distributor and manufacturer of the heart-lung machine. He recalled that, prior to the dismissal, he felt there was a substantial case against the manufacturer and

distributor. Mr. Brazier explained the reasons for the dismissal of Cardio by plaintiffs:

> ". . ., it's basically a matter of trial tactics. I think the way the case was discovered, we found that one of two things had happened in the operating room as best we could determine, one, that the pump winding for the . . ., sump pump had either been put in backwards and the machine was started, because the pump winding was in backwards, a vacuum was not created, but there was air at the end of the sump that was injected into the heart.
>
> "The other theory was that there was a switch on the base of the pump that would be put in a forward or a reverse position, and the switch was in the reverse position at the time the pump was started. I thought that on either one of these theories, it would be a relatively simple task to explain how the pump was put together and how it worked and what negligent act or ommission [*sic*] was done by the employee of the hospital. And I had no desire assuming sufficient assets and sufficient insurance to complicate a clear liability, relatively simple medical malpractice case by bringing in a products case. I didn't need it. I didn't want it. It would complicate my case, and I had no desire to do so. I thought it was in the best interest of my client not to have the manufacturer in the case.
>
> "Q And is that why you gave Mr. Bethke a dismissal, Mr. Bethke and his company a dismissal?
>
> "A Yes, in exchange of waiver of costs."

Mr. Pugh, the accountant for Cardio at the time of the dismissal, was permitted to testify concerning discussion of the suit at a board meeting in March 1979. It was felt that Cardio had very little exposure, and it was determined to approach plaintiffs regarding dismissal, citing the need for a continuance, and "[b]luff[ing] them out" about the

complexity of the case. The book value of the corporation in March 1979 was $250,000; the corporation had liability insurance coverage.

Based on the evidence presented at the hearing, the trial court found:

"

. . . . . .

"5. On April 26, 1979 plaintiffs filed a dismissal without prejudice as to DENNIS H. BETHKE, individually, and doing business as LIFE SUPPORT SYSTEMS, and CARDIO SYSTEMS, INC.

"6. Both as of April 15, 1979, when the aforesaid request for a dismissal was signed, and April 26, 1979, when it was filed, DENNIS H. BETHKE, individually, and doing business as LIFE SUPPORT SYSTEMS, and CARDIO SYSTEMS, INC., knew or should have known that plaintiffs' damages would be substantial.

"7. On April 15 and 26, 1979, the net worth of CARDIO SYSTEMS, INC. was approximately $250,000.00. On said dates, DENNIS BETHKE, individually and doing business as LIFE SUPPORT SYSTEMS, and CARDIO SYSTEMS, INC., knew or should have known that there was some potential liability as to them to plaintiffs.

"8. There was no consideration for the dismissal filed April 26, 1979 other than a waiver of costs.

"9. The overriding and primary purpose for plaintiffs dismissing defendants DENNIS H. BETHKE, individually, and doing business as LIFE SUPPORT SYSTEMS, and CARDIO SYSTEMS, INC. was the tactical decision on the part of plaintiffs' counsel to eliminate said parties from his clients' lawsuit to simplify the issues and obtain a prompt disposition of his clients' claims. Plaintiffs' counsel had reasonably concluded that he would be able to prove negligence on the part of defendant VALLEY CHILDREN'S HOS-

PITAL AND GUIDANCE CLINIC, and that defendant VALLEY CHILDREN'S HOSPITAL AND GUIDANCE CLINIC would be able to pay a judgment in the amount anticipated. Plaintiffs' counsel further reasonably concluded that the application of the doctrine of joint and several tort liability would enable him to obtain a judgment against VALLEY CHILDREN'S HOSPITAL AND GUIDANCE CLINIC for the total amount of his clients' damages.

"10. There was no 'collusion' as that term is generally understood (according to Webster's New Collegiate Dictionary, copyright 1949, which defines the term as 'a secret agreement and cooperation for a fraudulent or a deceitful purpose; deceit; fraud') between plaintiffs and DENNIS H. BETHKE, individually, and doing business as LIFE SUPPORT SYSTEMS, and CARDIO SYSTEMS, INC., in connection with the aforesaid dismissal.

"11. Under the circumstances herein, it would be unreasonable and unfair to permit the dismissal received from plaintiffs to operate as a bar to the claims of VALLEY CHILDREN'S HOSPITAL AND GUIDANCE CLINIC and CARDIOVASCULAR INSTRUMENTS, cross-complainants, for partial indemnity.

"12. There being some potential liability on the part of DENNIS H. BETHKE, individually, and doing business as LIFE SUPPORT SYSTEMS, and CARDIO SYSTEMS, INC., the dismissal for a waiver of costs could not have been reasonably proportionate to the potential liability to plaintiffs of DENNIS H. BETHKE, individually, and doing business as LIFE SUPPORT SYSTEMS, and CARDIO SYSTEMS, INC.

"13. The burden of proof utilized by the court was as required in the case of *Fisher vs. Superior Court*, (March, 1980) 103 Cal.App. 3rd 434, as modified in 104 Cal.App. 3rd 766c. Specifically, the court found

there was a settlement, that the burden of proof fell upon cross-complainants VALLEY CHILDREN'S HOSPITAL AND GUIDANCE CLINIC AND CARDIOVASCULAR INSTRUMENTS to prove the settlement was not in 'good faith,' and that said cross-complainants carried their burden."

The trial court further stated:

"From the foregoing Findings of Fact the court makes the following Conclusion of Law and enters the following judgment:

"DENNIS H. BETHKE, individually, and doing business as LIFE SUPPORT SYSTEMS, AND CARDIO SYSTEMS, INC., did not receive the dismissal filed April 26, 1979 in 'good faith' to the extent that 'good faith' is required before a dismissal can be used as a bar to an action for partial indemnity. Accordingly, said dismissal is not a bar to the claims of VALLEY CHILDREN'S HOPSITAL AND GUIDANCE CLINIC AND CARDIOVASCULAR INSTRUMENTS, cross-complainants, for partial indemnity against DENNIS H. BETHKE, individually, and doing business as LIFE SUPPORT SYSTEMS, and CARDIO SYSTEMS, INC."

Hospital has not questioned the right of Cardio to seek writ of mandate. As the trial, originally scheduled for May 4, 1981, has been continued to October 5, 1981, no stay order is necessary.

While Code of Civil Procedure section 877,[2] by its terms, discharges a settling defendant only from liability for *con-*

---

[2]Code of Civil Procedure section 877 provides: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—[¶] (a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and [¶] (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors."

tribution in a joint judgment, in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, the California Supreme Court applied comparative negligence principles and adopted a doctrine of partial indemnity subject to the application of section 877[3] but did not solve the dilemma of two good-faith settling defendants.

In *Sears, Roebuck & Co. v. International Harvester Co.* (1978) 82 Cal.App.3d 492, 497, the court considered whether a settling concurrent tortfeasor may continue to pursue his right of partial indemnity asserted by a presettlement cross-complaint against a party not named by plaintiff and concluded that a settling concurrent tortfeasor may pursue his right of equitable partial indemnity against other concurrent tortfeasors. This issue had not been considered

---

[3]"Although section 877 reflects a strong public policy in favor of settlement, this statutory policy does not in any way conflict with the recognition of a common law partial indemnity doctrine but rather can, and should, be preserved as an integral part of the partial indemnity doctrine that we adopt today. Thus, while we recognize that section 877, by its terms, releases a settling tortfeasor only from liability for contribution and not partial indemnity, we conclude that from a realistic perspective the legislative policy underlying the provision dictates that a tortfeasor who has entered into a 'good faith' settlement (see *River Garden Farms, Inc. v. Superior Court, supra*, 26 Cal.App.3d 986) with the plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor. As the Court of Appeal noted recently in *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236 [132 Cal.Rptr. 843]: 'Few things would be better calculated to frustrate [section 877's] policy, and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would lead to further litigation with one's joint tortfeasors, and perhaps further liability.' This observation is as applicable in a partial indemnity framework as in the contribution context. Moreover, to preserve the incentive to settle which section 877 provides to injured plaintiffs, we conclude that a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury. (See Fleming, *Foreword: Comparative Negligence At Last—By Judicial Choice* (1976) 64 Cal.L.Rev. 239, 258-259.)" (*American Motorcycle Assn. v. Superior Court, supra*, 20 Cal.3d at pp. 603-604.)

in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, *American Motorcycle Assn.*, or *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322.

Cardio contends that its release by plaintiffs in exchange for a waiver of costs was a good faith settlement which should bar Hospital from proceeding on the cross-complaint[4] and that as a matter of law the trial court ruled incorrectly in allowing Hospital to proceed. We agree that the settlement was made in good faith (see *Dompeling v. Superior Court* (1981) 117 Cal.App.3d 798) and, under the wording of the statute, we must agree that Cardio's liability on the cross-complaint is terminated.

The trial court obviously recognized the serious complications in the present law, concluded that there was no collusion nor bad faith in the Cardio settlement in the usual sense, but reasoned that to immunize Cardio would frustrate the entire purpose of the comparative fault cases and the expressed hierarchy of interests as enunciated in those cases.[5]

However, the court in *American Motorcycle* stated that "settlement" in good faith of the plaintiff's claim would also discharge a defendant from any claim for partial or comparative indemnity *in recognition of the legislative policy expressed in section 877.* None of the parties is arguing that the *American Motorcycle* case is inapplicable to this situation.

The public policies, which often compete with one another, are discussed in *Sears Roebuck & Co. v. International Harvester Co., supra,* 82 Cal.App.[3]d 492, 496:

---

[4]Code of Civil Procedure section 877, subdivision (b).

[5]*Li v. Yellow Cab Co., supra,* 13 Cal.3d 804; *American Motorcycle Assn. v. Superior Court, supra,* 20 Cal.3d 578; *Fisher v. Superior Court* (1980) 103 Cal.App.3d 434; *Sears, Roebuck & Co. v. International Harvester Co., supra,* 82 Cal.App.3d 492.

"We analyze the Supreme Court decisions as creating a hierarchy of interests. First in the hierarchy is maximization of recovery to the injured party for the amount of his injury to the extent fault of others has contributed to it. (See *Li v. Yellow Cab Co., supra,* 13 Cal.3d 804, eliminating the bar to recovery of contributory negligence, and *American Motorcycle Assn. v. Superior Court, supra,* 20 Cal.3d 578, retaining the rule of joint liability of concurrent tortfeasors and holding named defendants liable for damage assessable against unnamed persons.) Second is encouragement of settlement of the injured party's claim. (*American Motorcycle Assn. v. Superior Court, supra,* 20 Cal.3d at pp. 603-604.) Third is the equitable apportionment of liability among the tortfeasors. (*Id.*, 20 Cal.3d at pp. 603-605.)" (*Ibid*; fn. omitted.)

We hold that the *American Motorcycle* dicta, that a defendant who settles in good faith with plaintiff may elect to be free of the litigation, including partial or comparative indemnity claims of concurrent tortfeasors, does apply to any comparative indemnity claim that Hospital may have.

The trial courts and litigants have been plagued with piecemeal solutions to the complexities of comparative negligence since *Li v. Yellow Cab Co., supra,* 13 Cal.3d 804 (see Fleming, Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court (1979) 30 Hastings L.J. 1465). We recognize an obvious need for the adoption of a reasonable rule to aid trial courts with the claims of concurrent settling tortfeasors. In *Fisher v. Superior Court, supra,* 103 Cal.App.3d 434, the court noted that since *American Motorcycle* was decided by the California Supreme Court, the superior courts in California have been deluged with cross-complaints for

comparative equitable indemnity between alleged joint tortfeasors. However, the good-faith test is the only existing rule provided by statute or case law and if Cardio settled in good faith with the plaintiffs, Cardio's affirmative defense prevails as a bar to recovery on a claim for equitable indemnity within the concept of the *American Motorcycle* case.

We held in *Dompeling v. Superior Court, supra,* 117 Cal.App.3d 798 that a settling defendant owes no duty to a nonsettling codefendant except to refrain from tortious or other wrongful conduct and that, absent such conduct, a settling party may act to further its own interests without regard to the effect of the settlement upon codefendants. (*Id.*, at pp. 809-810.) Cardio Systems acted consistently with that principle and, under the rather simple terms of the statute that the settlement be in good faith, proceeded in good faith.

The trial judge in his oral statement concluded that the dismissal for costs was without collusion, concealment or sinister motive to injure the hospital and was done in good faith within the usual and ordinarily accepted meaning of that term, and that the Cardio defendants "would have been out of their minds not to [settle]." Nevertheless, the court held that the dismissal was not in good faith within the *meaning* of the statute. But, without further legislative clarification, the term "good faith" must be given a meaning within the usual sense of the term; under such a definition Hospital is barred by a good faith dismissal from seeking indemnity against Cardio.[6]

---

[6]We have considered many alternative arguments, for example, questioning whether a settlement for "cost" is in fact a "settlement" at all within the meaning of the statute (see discussion in *Commerical U. Ins. Co. v. Ford Motor Co.* (1981) 640 F.2d 210, 212-213), but such arguments offer no solution where a defendant such as Cardio pays $100 in settlement, or $200, and does so without any collusion or fraud or intent to injure. We conclude that plaintiffs and Cardio entered into a settlement as the trial court found, and, as was made clear at the trial level, a settlement in actual good faith. (See *Setzer v. Moore* (1927) 202 Cal. 333, 340; Kikel, Comments, *Comparative Negligence, Multiple Parties, and Settlements* (1977) 65 Cal.L.Rev. 1264.)

The result is unsatisfactory. The rule permits a plaintiff to insulate a defendant (Cardio) from being liable to a co-defendant (Hospital) for comparative indemnity by dismissing against Cardio in consideration of a waiver of costs where the dismissal is motivated by plaintiffs' tactical considerations having little relationship to the potential liability of Cardio. The facts show that plaintiffs' counsel was of the opinion that plaintiffs had a fairly good liability case against Cardio and the reason for the dismissal against Cardio, according to the testimony of plaintiffs' counsel, was to avoid complicating plaintiffs' "clear liability, relatively simply medical malpractice case" against Hospital. The result is fundamentally unfair, and cannot be what the Legislature intended.

The Legislature could not anticipate the problems arising after the Supreme Court's decision in *American Motorcycle Assn. v. Superior Court, supra,* 20 Cal.3d 578; however, the governing section (Code Civ. Proc., § 877) needs to be reexamined in light of that decision. The Legislature is equipped with the facilities and the forum to hear from all interested parties and to pass appropriate amendments to Code of Civil Procedure section 877; the Legislature should move with dispatch to prevent the occurrence of such an unfortunate result as in this case.

Let a writ of mandate issue directing the trial court to vacate its order of March 23, 1981, and to enter a new order sustaining Cardio's special defense to the cross-complaint.

/s/ Hanson, P.D., J.

WE CONCUR:

/s/ Brown, Geo. A., P.J.

/s/ Franson, J.